Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

EMANUEL OBAJULUWA,

Petitioner,

v.

JANET RENO, Attorney General, United States of America; IMMIGRATION AND NATURALIZATION SERVICE; ARTHUR E. STRAPP, District Director,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID I. SCHILLER
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1717 Main Street, Ste. 5400
Dallas, Texas 75201-7390
(214) 698-3100

SETH M.M. STODDER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed the jurisdiction of the federal courts under 28 U.S.C. § 2241 to consider on a petition for a writ of habeas corpus constitutional and statutory claims asserted by aliens convicted of crimes specified in the Immigration and Nationality Act ("INA").

2. Whether any such repeal of habeas corpus jurisdiction under 28 U.S.C. § 2241 violates Article I, § 9, cl. 2 (the "Suspension Clause") or Article III of the United States Constitution, or the Due Process Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

All parties below are named in the caption.

Petitioner Emanuel Obajuluwa was the petitioner/appellant below.

Respondents Janet Reno, Immigration and Naturalization Service, and Arthur E. Strapp were the respondents/appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emanuel Obajuluwa respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-5a) is not reported. The judgment and order of the district court (*id.* at 6a-7a) are not reported. The Findings and Recommendations of the United States Magistrate Judge (*id.* at 8a-12a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 7, 2000. Mr. Obajuluwa did not seek rehearing. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 9, cl. 2 of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Due Process Clause of the Fifth Amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

3. Article III of the United States Constitution provides, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]"

4. INA § 242(a)(2)(C), added to the Immigration and Nationality Act by IIRIRA and codified at 8 U.S.C. § 1252(a)(2)(C), provides, in pertinent part:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section [1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)], or any offense covered by section [1227(a)(2)(A)(ii)] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section [1227(a)(2)(A)(i)].

5. INA § 242(b)(9), added to the Immigration and Nationality Act by IIRIRA and codified at 8 U.S.C. § 1252(b)(9), provides, in pertinent part:

> Judicial review of all questions of law and fact, including interpretation and application of constitu-

tional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

6. 28 U.S.C. § 2241 provides, in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

STATEMENT OF THE CASE

Petitioner Emanuel Obajuluwa ("Mr. Obajuluwa") is a Nigerian citizen who has lived in the United States for almost 20 years, and as a lawful permanent resident since 1990. On August 18, 1994, Mr. Obajuluwa pled guilty to credit card fraud and conspiracy to commit wire fraud, money laundering, and credit card fraud, and was sentenced to 56 months in prison. At the time he entered his 1994 guilty plea, Mr. Obajuluwa was eligible to seek relief from deportation under INA § 212(c) (8 U.S.C. § 1182(c)), which permits the Attorney General to grant relief from deportation for humanitarian reasons.

On April 24, 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214), which, at § 440(d), eliminated the ability of so-called "aggravated fel-

ons" to obtain discretionary relief under INA § 212(c). On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (Pub. L. No. 104-208, 110 Stat. 3009), which, among other things, repealed INA § 212(c) altogether, replacing it with a new, similar section, INA § 240A (8 U.S.C. § 1229b). As with INA § 212(c) after AEDPA, INA § 240A bars the granting of discretionary "cancellation" of removal for aggravated felons.

On April 22, 1997, almost three years after Mr. Obajuluwa's 1994 guilty plea, the Immigration and Naturalization Service ("INS") commenced removal proceedings against Mr. Obajuluwa. *See* R. 46.[1] On September 28, 1998, the Board of Immigration Appeals ("BIA") affirmed an immigration judge's previous determination that Mr. Obajuluwa was subject to removal, and further denied Mr. Obajuluwa's request for relief under INA § 212(c), finding that such relief had been "repealed and replaced by [INA § 240A]," and that Mr. Obajuluwa was not eligible for "cancellation of removal" under INA § 240A, because he had been convicted of "aggravated felonies." *See* R. 47-48. The BIA also declined to address Mr. Obajuluwa's objections to the constitutionality of the INS's applying INA § 240A's bar on relief for "aggravated felons" retroactively by using Mr. Obajuluwa's 1994 guilty plea to disqualify him from any such relief. *Id.* The BIA denied reconsideration on November 25, 1998. *See* R. 50-51.

A. Proceedings In The District Court

On February 9, 1999, Mr. Obajuluwa filed a Petition for a Writ of Habeas Corpus (the "Petition") in the United States

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[1] Cites to "R." refer to the record on appeal.

District Court for the Northern District of Texas.[2] In the Petition, Mr. Obajuluwa challenges the legality of the BIA's removal order, asserting that its retroactive application of the 1996 IIRIRA provisions to his 1994 guilty plea was contrary to the INA, and violated the Due Process Clause of the Fifth Amendment and the *Ex Post Facto* Clause of the United States Constitution (U.S. CONST., art. I, § 9, cl. 3). R. 1-51. The jurisdictional bases for the Petition are 28 U.S.C. § 2241 and Article I, § 9, cl. 2 of the United States Constitution (the Suspension Clause). *Id.*

On April 27, 1999, the United States Magistrate Judge issued his Findings and Recommendations, dismissing Mr. Obajuluwa's Petition for lack of subject matter jurisdiction. *See* App. 3a. The Magistrate Judge's ruling rested primarily upon the view that INA § 242(g), enacted by IIRIRA and codified at 8 U.S.C. § 1252(g), had repealed 28 U.S.C. § 2241. *Id.* at 11a-12a. On May 10, 1999, Mr. Obajuluwa filed Objections to the Magistrate Judge's Findings and Recommendations. *See* R. 156-87. On May 24, 1999, United States District Judge Jorge A. Solis adopted the Magistrate Judge's Findings and Recommendations and dismissed the Petition "for lack of jurisdiction." App. 7a. The district court did not reach the merits of the constitutional and statutory claims raised in Mr. Obajuluwa's Petition. *Id.*

B. Proceedings In The Court Of Appeals

On July 19, 1999, Mr. Obajuluwa filed his Notice of Appeal. R. 204. In his appeal, Mr. Obajuluwa argued that the district court's dismissal of his Petition was error for several reasons:

First, Mr. Obajuluwa argued that, in light of this Court's ruling in *Reno v. American-Arab Anti Discrimination Com-*

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[2] Venue was proper in Texas, because of Mr. Obajuluwa's continued detention by the INS in the Northern District.

mittee, 525 U.S. 471, 482 (1999) ("*AADC*"), 8 U.S.C. § 1252(g) could not be construed as repealing habeas corpus jurisdiction under 28 U.S.C. § 2241.

Second, Mr. Obajuluwa argued that AEDPA § 401(e) could not be construed as eliminating habeas corpus jurisdiction under 28 U.S.C. § 2241.

Third, Mr. Obajuluwa argued that neither 8 U.S.C. § 1252(a)(2)(C) nor 8 U.S.C. § 1252(b)(9) could properly be construed as repealing habeas corpus jurisdiction under 28 U.S.C. § 2241.

Fourth, Mr. Obajuluwa argued that, to the extent that any provisions of AEDPA or IIRIRA could be read to eliminate habeas corpus jurisdiction, they violate Article I, § 9, cl. 2 (the "Suspension Clause") and Article III of the United States Constitution, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Fifth, Mr. Obajuluwa argued that, to the extent the Court of Appeals determined that habeas corpus jurisdiction had been eliminated, it should apply this rule prospectively, given Mr. Obajuluwa's reliance on prior contrary holdings by the Court of Appeals interpreting virtually identical language. *See Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir. 1998) (IIRIRA § 309(c)(4)(G) eliminates petition-for-review jurisdiction, but habeas corpus jurisdiction under 28 U.S.C. § 2241 is still available); *Nguyen v. INS*, 117 F.3d 206 (5th Cir. 1997) (same); *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997) (AEDPA § 440(a) prohibits aggravated felon from bringing direct petition for review, but does not preclude habeas corpus jurisdiction under 28 U.S.C. § 2241).

On July 7, 2000, the Court of Appeals affirmed the district court's dismissal of Mr. Obajuluwa's Petition for lack of subject matter jurisdiction. In its unpublished *per curiam* opinion, the Court of Appeals followed its previous published decisions in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *Garnica-Vasquez v. Reno*, 210 F.3d 558 (5th Cir. 2000), and *Finlay v. INS*, 210 F.3d 556 (5th Cir. 2000), and ruled that "the IIRIRA permanent rules removed federal ha-

beas jurisdiction under 28 U.S.C. § 2241 over challenges to orders removing certain criminal aliens under 8 U.S.C. § 1252(a)(2)(C)." App. 3a-4a. The Court of Appeals further ruled that "any remaining habeas jurisdiction under the Constitution did not encompass the claims petitioner raised, including the claim that he had a right to be considered for discretionary relief from removal, which his status as an aggravated felon precluded." *Id.* at 4a (citing *Max-George*, 205 F.3d at 202).

The Court of Appeals further ruled that "[a]n alien convicted of an aggravated felony and subject to a final order of removal on that basis must file a petition for review in the court of appeals." *Id.* (citing *Max-George*, 205 F.3d at 202). As stated by the Court of Appeals, "[i]f a petition for review is filed, then the court of appeals must determine whether '(1) the specific conditions that bar jurisdiction in the court of appeals exist, (2) the conditions barring jurisdiction are constitutionally applied to the petitioner, and (3) the level of judicial review remaining is constitutionally adequate . . . .'" *Id.* (quoting *Max-George*, 205 F.3d at 202). The Court of Appeals further stated that "unless 'a petitioner proves that his or her claims are within the writ constitutionally protected (a situation which, as the Seventh Circuit has noted, is unlikely), we must summarily dismiss for lack of jurisdiction.'" *Id.* (quoting *Garnica-Vasquez*, 210 F.3d at 560).

The Court of Appeals then ruled that "[t]he record in this case discloses no basis for finding that Obajuluwa raised claims within the constitutional writ, which is narrower than under section 2241." *Id.* at 4a. The Court of Appeals stated that "[t]his court has held that a retroactively applied criminal categorization in the immigration context is not a due process violation, *see Max-George*, 205 F.3d at 200, and that denial of consideration for discretionary relief from removal is not a constitutional violation, *see Finlay*, 210 F.3d at 557." *Id.* at 4a-5a.

Thus, the Court of Appeals ruled that the district court had "correctly dismissed Obajuluwa's habeas petition for lack of jurisdiction." *Id.* at 5a.

Mr. Obajuluwa did not seek rehearing of the *per curiam* ruling of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* for three reasons:

First, the determination by the Court of Appeals that 8 U.S.C. §§ 1252(a)(2)(C) and 1252(b)(9), enacted by IIRIRA, repealed habeas corpus jurisdiction, squarely conflicts with this Court's clear holdings in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868), that habeas corpus jurisdiction cannot be repealed "by implication." *Felker*, 518 U.S. at 660-61. A repeal of habeas corpus jurisdiction can only be effected by clear congressional command. Because neither 8 U.S.C. § 1252(a)(2)(C) nor 8 U.S.C. § 1252(b)(9) even mention habeas corpus jurisdiction under 28 U.S.C. § 2241, let alone explicitly provide for its repeal, the ruling by Court of Appeals clearly conflicts with the *Felker / Yerger* rule. This Court should grant *certiorari* to resolve this conflict and correct the erroneous determination by the Court of Appeals.

Second, the ruling by the Fifth Circuit in this case, in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), and in other cases, squarely conflicts with contrary rulings in the First, Second, Third, and Ninth Circuits. Contrary to the Fifth Circuit, the First, Second, Third, and Ninth Circuits uniformly follow the *Felker / Yerger* rule and hold that the permanent provisions of IIRIRA did *not* repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See Mahadeo v. Reno*, __ F.3d __, 2000 WL 1257273 (1st Cir. Sept. 11, 2000) (following *Felker* and *Yerger* to hold that IIRIRA did not repeal habeas jurisdiction under 28 U.S.C. § 2241); *Calcano-Martinez v. INS*, __ F.3d __, 2000 WL 1336611 (2d Cir. Sept. 1, 2000) (same); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000) (same); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000) (same); *contra Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (ruling that IIRIRA did repeal habeas corpus jurisdiction under 28 U.S.C. § 2241, in accord with the Fifth Circuit's ruling in this case and in *Max-George*), *cert. denied*,

120 S. Ct. 1529 (2000). This Court should grant *certiorari* to resolve this clear conflict among the lower courts.

Third, this Court should grant *certiorari* because this petition presents constitutional and statutory questions of exceptional importance to the Nation's enforcement of its immigration laws. The question of whether federal courts have habeas corpus jurisdiction to consider claims by aliens seeking to challenge removal orders is recurring, and the continuing lower court conflict over the issue has led to dramatically different results in identical cases. The Court should grant *certiorari* to put to rest the uncertainty pervading this important area of the law.

A. The Decision Below Directly Conflicts With This Court's Clear Rule That Repeals Of Habeas Corpus Jurisdiction Must Be Explicit, And Cannot Be By Implication

1. Section 2241 of Title 28 of the United States Code, which provides that federal courts have jurisdiction to grant writs of habeas corpus to persons "in custody in violation of the Constitution or laws or treaties of the United States," traces its lineage to § 14 of the Judiciary Act of 1789 (1 Stat. 73, 81-82). *See Felker*, 518 U.S. at 661 (describing this provision of the Judiciary Act as the direct ancestor of the current 28 U.S.C. § 2241). As far back as its decision in *United States v. Jung Ah Lung*, 124 U.S. 621 (1888), this Court has recognized that, under § 2241, federal district courts have habeas corpus jurisdiction to consider the legality of deportation or exclusion orders entered against aliens. As stated by the Court in *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."

In *Ex parte Yerger*, this Court ruled emphatically that repeals of habeas corpus jurisdiction "by implication are not favored." *Yerger*, 75 U.S. at 105. Thus, the Court ruled that

Congress's 1867 repeal of the Court's appellate jurisdiction over habeas corpus petitions did not operate to repeal the Supreme Court's general habeas corpus jurisdiction under the 1789 Judiciary Act. As stated by the Court:

> [T]here are no repealing words in the [A]ct of 1867. If it repealed the [A]ct of 1789, it did so by implication. . . . Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former [A]ct can stand together with the new [A]ct.

Yerger, 75 U.S. at 105.

In the 1996 *Felker* decision, the Court interpreted AEDPA § 106(b) (codified at 28 U.S.C. § 2244(b)(3)(E)) in light of the *Yerger* rule. This provision bars state prison inmates from filing "second or successive" habeas corpus petitions without first obtaining permission from a three-judge panel of the relevant court of appeals. The statute provides that a panel's grant or denial of authorization to file "shall not be appealable and shall not be the subject of a petition for . . . writ of *certiorari*." 28 U.S.C. § 2244(b)(3)(E). Noting that "[n]o provision of Title I [of AEDPA] mentions our authority to entertain original habeas petitions," the Court ruled that because repeals of habeas corpus jurisdiction by implication are not favored, AEDPA § 106(b) did not preclude the Court from exercising its original habeas jurisdiction under 28 U.S.C. § 2241. *Felker*, 518 U.S. at 660.

Read together, *Felker* and *Yerger* "establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a *plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice*." *Sandoval v. Reno*, 166 F.3d 225, 232 (3d Cir. 1999) (emphasis added). *See also Calcano-Martinez*, 2000 WL 1336611, at *10 (declining to "strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal," holding that under *Felker* and *Yerger*, "a court

cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name."); *Mahadeo*, 2000 WL 1257273, at *5 ("'any repeal of the federal courts' historic habeas jurisdiction . . . must be explicit and make express reference specifically to the statute granting jurisdiction'") (quoting *Goncalves v. Reno*, 144 F.3d 110, 120 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999)).

2. No provision of IIRIRA contains an "express statement of congressional intent" to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *Sandoval*, 166 F.3d at 236-37. Indeed, the provisions relied upon by the court below – 8 U.S.C. § 1252(a)(2)(C) and 8 U.S.C. § 1252(b)(9) – do not even *mention* habeas corpus jurisdiction at all, let alone habeas jurisdiction under § 2241.

Thus, under the *Felker* / *Yerger* rule against repeals of habeas corpus jurisdiction "by implication," IIRIRA cannot be construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241.

3. The language in 8 U.S.C. § 1252(a)(2)(C) providing that "no court shall have jurisdiction to review any final order of removal," and in § 1252(b)(9) providing that "[j]udicial review . . . shall be available only in judicial review of a final order under this section," does not require a contrary conclusion.

As numerous courts have held, the term "judicial review," as it is used in such jurisdiction-limiting statutes as 8 U.S.C. §§ 1252(a)(2)(C) and 1252(b)(9), does *not* include habeas corpus jurisdiction under 28 U.S.C. § 2241. As the Third Circuit in *Sandoval* has emphasized:

> [I]n the immigration context, the [Supreme] Court has historically drawn a sharp distinction between "judicial review" – meaning APA review – and the court's power to entertain petitions for writs of habeas corpus.

Sandoval, 166 F.3d at 235 (citing *Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953)); *see also Flores-Miramontes*, 212 F.3d at 1140 (same).

Based on this fundamental distinction, and in accord with the *Felker / Yerger* rule against repeals of habeas jurisdiction by implication, this Court has repeatedly found jurisdiction to consider habeas corpus petitions challenging deportation orders, despite statutory provisions (such as 8 U.S.C. § 1252(a)(2)(C)) purportedly barring all "judicial review." Indeed, the initial recognition of such habeas corpus jurisdiction by the Court, in *Jung Ah Lung*, 124 U.S. 621, stemmed from an attempt by the government to argue that this power had been eliminated by an Act of Congress – the Chinese Exclusion Act. Rejecting this argument, the district court emphasized that "[s]uch an abrogation of the writ of *habeas corpus*, which has always been considered among English-speaking peoples the most sacred muniment of personal freedom, must be unmistakably declared by congress before any court could venture to withhold its benefits from any human being[.]" *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885). This ruling was affirmed by the Court in *Jung Ah Lung*, 124 U.S. at 628-30; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1004-06 (1998) (discussing the *Jung Ah Lung* decision).

From that point forward, federal courts have consistently utilized the writ of habeas corpus to review the legality of deportation or exclusion orders, despite express congressional efforts to restrict judicial review. Indeed, courts did this, despite a provision in the 1891 Immigration Act providing that "[a]ll decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, *shall be final* unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury" (Immigration Act of 1891, ch. 551, § 8 (26 Stat. 1084, 1085) (emphasis added)) and a similar provision in the 1917 Immigration Act (*see* § 19, 29 Stat. 874). Indeed, in *Nishimura Ekiu*, the first

case to interpret the "finality" provision of the 1891 Act, the Court declared that "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Nishimura Ekiu*, 142 U.S. at 660. *Accord Yamataya v. Fisher*, 189 U.S. 86 (1903) (similarly considering habeas corpus petition, despite 1891 Act's "finality" provision); *see generally Henderson v. INS*, 157 F.3d 106, 112-17 (2d Cir. 1998) (discussing history of habeas corpus jurisdiction, despite statutory provisions restricting judicial review), *cert. denied*, 526 U.S. 1004 (1999).

In *Heikkila v. Barber*, 345 U.S. 229 (1953), the Court explicitly rejected the view that "habeas corpus itself represented judicial review." *Id.* at 235. In that case, the Court held that the enactment of the Administrative Procedure Act of 1946 did not supercede federal courts' habeas corpus jurisdiction to consider challenges to deportation orders. The Court further emphasized that although the 1917 Act was a "statute precluding judicial review," an alien could still maintain a habeas corpus petition. *Id.* In so doing, the Court observed that despite Congress's effort to make deportation decisions "nonreviewable to the fullest extent possible under the Constitution," habeas corpus jurisdiction still existed to consider challenges to such orders. *Id.* at 234; *see also Sandoval*, 166 F.3d at 235 (noting that in *Heikkila*, the Court has "expressly rejected the conclusions of three courts of appeals that had 'taken the position that habeas corpus itself represented judicial review.'") (citation omitted).

Under these authorities, and consistent with the *Felker / Yerger* clear statement rule, it is clear that the restriction on "judicial review" contained in 8 U.S.C. §§ 1252(a)(2)(C) and (b)(9) does *not* preclude habeas corpus jurisdiction under § 2241. Thus, the contrary determination by the Court of Appeals in this case and in *Max-George* squarely conflicts with the well-established law of this Court.

4. For similar reasons, the phrase "notwithstanding any other provision of law," as used in 8 U.S.C. § 1252(a)(2)(C),

also does not mandate a contrary conclusion. This additional phrase does not provide 8 U.S.C. §§ 1252(a)(2)(C) or 1259(b)(9) any additional scope, such that the statute would satisfy the *Felker / Yerger* rule against repeals of habeas jurisdiction by implication. Moreover, the phrase does not negate this Court's traditional distinction between "judicial review" and habeas corpus, discussed above. The statute is, thus, indistinguishable from the statutes at issue in *Heikkila*, *Nishimura Ekiu*, and other cases in which the Court ruled that despite statutory provisions explicitly precluding "judicial review," habeas corpus jurisdiction still existed.

Thus, the determination by the Court of Appeals flatly contradicts this Court's holdings in *Felker* and *Yerger*, as well as the past century of precedents concluding that limitations on "judicial review" do not constitute implied repeals of habeas corpus jurisdiction. For this reason, the Court should grant *certiorari*.

B. The Decision Of The Court Of Appeals Squarely Conflicts With Contrary Decisions Of The First, Second, Third, And Ninth Circuits

The decision below conflicts not only with this Court's precedents, but also with decisions of the First, Second, Third, and Ninth Circuits – all uniformly holding that IIRIRA did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. For this additional reason, the Court should grant *certiorari* to resolve this split in lower court authority.

Indeed, the ruling of the Court of Appeals reveals a profound circuit split on this issue. For example, in *Mahadeo v. Reno*, __ F.3d __, No. 99-1687, 2000 WL 1257273 (1st Cir. Sept. 11, 2000), the First Circuit followed *Felker* and *Yerger* to hold unequivocally that because "IIRIRA's permanent rules – like the transitional rules before them – lack a clear statement of intent to repeal § 2241 jurisdiction," IIRIRA could not be construed to repeal such jurisdiction. *Id.*, 2000 WL 1257273, at *9; *see also Sousa v. INS*, __ F.3d __, No. 99-2049, 2000 WL 1358469, at *6 (1st Cir. Sept. 22, 2000) (following *Mahadeo*, dismissing for lack of jurisdiction the

alien's petition for review, and holding that the alien could seek "habeas relief in the district court" under 28 U.S.C. § 2241).

In *Calcano-Martinez v. INS*, __ F.3d __, Nos. 98-4033, 98-4214, 98-4246, 2000 WL 1336611 (2d Cir. Sept. 1, 2000), the Second Circuit similarly followed *Felker* and *Yerger* to hold that IIRIRA had not repealed habeas corpus jurisdiction under 28 U.S.C. § 2241. As stated by the court, "there is . . . nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Id.*, 2000 WL 1336611, at *11. The Second Circuit also followed *Heikkila* and other authorities and further stated that "[w]e will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas." *Id.* In reaching these conclusions, the Second Circuit expressly rejected the contrary rulings of the Fifth Circuit (in *Max-George*) and the Eleventh Circuit (in *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000)). *See id.*, 2000 WL 1336611, *9-10.

In *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), the Third Circuit also followed *Felker* and *Yerger* to hold that IIRIRA did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. In so doing, the court also explicitly rejected the view of the Fifth and Eleventh Circuits. As stated by the court:

> The holdings of both *Richardson* cases and *Max-George* that Congress need not mention habeas or § 2241 to repeal the district courts' habeas jurisdiction are at odds not only with our reasoning in *Sandoval* but with the reasoning of the other courts of appeals that have read the Supreme Court's precedent in *Yerger* and *Felker* to require explicit statutory reference to habeas or § 2241 to effect congressional repeal of habeas jurisdiction.

Liang, 206 F.3d at 320.

Finally, in *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000), the Ninth Circuit similarly ruled that IIRIRA had not repealed jurisdiction under 28 U.S.C. § 2241. *Id.* at 1136.

These decisions of the First, Second, Third, and Ninth Circuits all squarely conflict with those of the Fifth Circuit (not only the decision below, but in *Max-George*) and the Eleventh Circuit (in *Richardson*). Moreover, these cases are indistinguishable from each other. All of these cases were presented with the same question for review – whether an alien could seek habeas corpus relief under 28 U.S.C. § 2241, despite IIRIRA's permanent provisions. The First, Second, Third, and Ninth Circuits have said yes, and the Fifth and Eleventh Circuits have said no. This is a clear conflict in authority calling out for resolution.

For this additional reason, the Court should grant *certiorari*.

C. Resolution Of The Questions Presented Is Of Vital Importance To The Interpretation And Enforcement Of The Immigration Laws

It is beyond peradventure that resolving the question of whether IIRIRA repealed habeas corpus jurisdiction under 28 U.S.C. § 2241 is of vital importance to the fair and orderly application of our Nation's immigration laws. Indeed, the current situation – in which some circuits have determined that jurisdiction under § 2241 exists and some have not – is clearly untenable, given that the degree to which the legality of a removal order can be challenged is entirely dependent upon the physical location of the alien. *Certiorari* is clearly warranted to resolve this important conflict.

Moreover, the question of whether IIRIRA repealed § 2241 raises serious and complex questions of both statutory interpretation and constitutional law that should be resolved as quickly as possible. Indeed, if the Court determines that IIRIRA repealed § 2241, it must face the question of whether

such a repeal – essentially eliminating the ability of aliens convicted of certain crimes to challenge the legality of their removal orders in Article III courts – violates the Constitution.

And, given that under 8 U.S.C. § 1252(a)(2)(C), aliens convicted of aggravated felonies are precluded from bringing a petition for review in the court of appeals, *see Calcano-Martinez*, 2000 WL 1336611, *14 (holding that § 1252(a)(2)(C) eliminates petition-for-review jurisdiction for aliens convicted of certain crimes), such a repeal *would* be unconstitutional.

First, such a repeal would violate Article I, § 9, cl. 2 of the Constitution (the "Suspension Clause"). At a minimum, this Clause requires that Congress provide a means of judicial scrutiny that is "neither inadequate nor ineffective to test the legality of a person's detention . . . ." *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (citing *United States v. Hayman*, 342 U.S. 205, 223 (1952)). Since *Jung Ah Lung*, this Court has extended that constitutional right to require judicial scrutiny of deportation orders. *Jung Ah Lung*, 124 U.S. at 628-30; *see also Heikkila*, 345 U.S. at 234 (interpreting the "finality" clauses of the 1891 and 1917 Immigration Acts as making deportation decisions "nonreviewable to the fullest extent possible under the Constitution"). Given the clear bar on the review of removal orders against aggravated felons under 8 U.S.C. § 1252(a)(2)(C), the Suspension Clause is clearly violated if IIRIRA is construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241.

Second, if IIRIRA were construed to repeal habeas corpus jurisdiction under 28 U.S.C. § 2241, this would violate the Fifth Amendment's guarantee of due process. It is well established that, given the consequences of deportation, *see Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation and the resulting separation from home and family can deprive a person of "all that makes life worth living"), lawful permanent residents have constitutional due process rights in deportation proceedings. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 (1953). These due process guarantees

would, of course, be meaningless if judicial scrutiny of the legality of removal orders were deemed entirely eliminated by IIRIRA. *See Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) ("while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law"). Thus, any repeal of habeas corpus jurisdiction, combined with the elimination of petition-for-review jurisdiction, would violate fundamental due process.

Finally, repeal of 28 U.S.C. § 2241 would violate the Separation of Powers principles embodied in Article III of the Constitution, for it would eliminate the "essential function" of the judiciary (*United States v. Nixon*, 418 U.S. 683, 707 (1974)) – *i.e.*, to provide "independent and impartial adjudication . . . of matters within the judicial power of the United States[,]" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), and to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In ruling that IIRIRA did not repeal 28 U.S.C. § 2241, the First, Second, Third, and Ninth Circuits expressly avoided these serious and complex constitutional questions. *See, e.g., Calcano-Martinez*, 2000 WL 1336611, *10 ("our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional questions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions"); *Liang*, 206 F.3d at 321 (ruling that IIRIRA did not repeal § 2241 jurisdiction "obviates the serious constitutional problems that would arise were we to . . . read the permanent rules to strip the district courts of habeas jurisdiction"). This avoidance of a constitutional confrontation is consistent with the basic principle that courts should construe statutes to avoid constitutional confrontations or "doubt." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561 (1990). *Accord Spector Motor Serv., Inc. v. McLaughlin*,

323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

The court below's attempt to avoid the unconstitutional implications of its ruling – by interpreting 8 U.S.C. § 1252(a)(2)(C) as permitting limited petitions for review by aliens convicted of aggravated felonies – is plainly unpersuasive and inadequate, and utterly conflicts with the plain language of the statute. Indeed 8 U.S.C. § 1252(a)(2)(C) plainly states that "*no* court shall have jurisdiction to review *any* final order" (emphasis added). For these reasons, the First, Second, Third, Fourth, and Ninth Circuits have all uniformly rejected the Fifth Circuit's counter-textual reading of § 1252(a)(2)(C). *See Sousa*, 2000 WL 1358469, *6 (INA section 242(a)(2)(C) precludes our review of any final order of removal by an alien removable because he is an aggravated felon"); *Calcano-Martinez*, 2000 WL 1336611, *13 (same); *Flores-Miramontes*, 212 F.3d at 1136 (same); *Liang*, 206 F.3d at 322 (same); *Lewis v. INS*, 194 F.3d 539, 541 (4th Cir. 1999) (same).

Thus, the serious constitutional consequences of the lower court's ruling are inescapable, and require attention by this Court. For this additional reason, *certiorari* is warranted in order to resolve and clarify this important area of the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

October 5, 2000

DAVID I. SCHILLER
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1717 Main Street, Ste. 5400
Dallas, Texas 75201-7390
(214) 698-3100

SETH M.M. STODDER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10831

EMANUEL OBAJULUWA,

Petitioner – Appellant,

VS.

JANET RENO, Attorney General, United States of America; IMMIGRATION AND NATURALIZATION SERVICE; ARTHUR E. STRAPP, District Director,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3: 99-CV-285)

July 7, 2000

Before WIENER and STEWART, Circuit Judges; and ROSENTHAL, District Judge.*

PER CURIAM:**

Emanuel Obajuluwa appeals this district court's dismissal of his habeas corpus petition challenging an Immigration and

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*District Judge of the Southern District of Texas, sitting by designation.

**Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Naturalization Service final order removing him from this country. The district court held that it lacked jurisdiction over Obajuluwa's petition. Applying this circuit's recent holding in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), we affirm.

I. BACKGROUND

Obajuluwa is a Nigerian citizen who entered the United States in December 1981. He became a lawful permanent resident on December 27, 1990. On August 18, 1994, Obajuluwa was convicted of credit card fraud and conspiracy to commit wire fraud, money laundering, and credit card fraud. The district court sentenced Obajuluwa to two concurrent terms of 56 months of imprisonment.

On April 22, 1997, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Obajuluwa under 8 U.S.C. § 1227(a)(2)(A)(iii) (West Supp. 1998), based on his felony conviction. An immigration judge ordered Obajuluwa removed to Nigeria on March 6, 1998. Obajuluwa appealed to the Board of Immigration Appeals ("BIA"); the BIA dismissed Obajuluwa's appeal on September 28, 1998. The removal order became final on November 25, 1998, the date the BIA denied Obajuluwa's motion to reconsider.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which limited federal court jurisdiction over certain removal orders, an alien has thirty days to appeal an order of removal and must pursue that appeal in the court of appeals, not the district court. Obajuluwa did not file a petition for review in the court of appeals within the thirty days permitted. Instead, Obajuluwa filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas. In that petition, Obajuluwa asserted that the retroactive application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA to eliminate eligibility for discretionary relief under section 212(c) of the Immigration and Naturalization Act denied him due process and violated the

Ex Post Facto Clause. He also alleged that the INS illegally delayed beginning removal proceedings against him until 1997, in violation of 8 U.S.C. § 1229(d).

The district court, adopting the magistrate judge's recommendation, dismissed Obajuluwa's habeas petition for lack of jurisdiction. On this appeal, Obajuluwa first claims that the permanent provisions of IIRIRA, as codified at 8 U.S.C. § 1252(a)(2)(C), did not strip the district court of habeas jurisdiction to review the order to remove him as an alien convicted of an aggravated felony. He also argues that if section 1252(a)(2)(C) does eliminate habeas jurisdiction in the district court, this provision should be applied prospectively; that his habeas petition should be treated as a petition for review under section 1252(b); or that this court should allow him to submit an out-of-time petition for review.

II. ANALYSIS

This case is controlled by this circuit's recent decisions in *Max-George v. Reno*, 205 F.3d 194 (5th Cir. Feb. 24, 2000); *Garnica-Vasguez v. Reno*, 210 F.3d 558 (5th Cir. May 4, 2000); and *Finlay v. INS*, 210 F.3d 556 (5th Cir. May 4, 2000). In those cases, as here, a resident alien convicted of an offense characterized as an aggravated felony raised a habeas challenge to an INS final removal order. The underlying claims in those cases bear substantial similarity to the claims Obajuluwa raises here: the petitioner in *Max-George* "claimed that the 'retroactive' application of the 'aggravated felon' classification deprived him of due process[,]" *Max-George*, 205 F.3d at 196, and the petitioner in *Finlay* claimed that "Ex Post Facto law denied him the chance to obtain discretionary relief from removal." *Id.*, 210 F.3d at 557. Obajuluwa makes only one argument not addressed in these earlier cases: his claim that the INS unreasonably delayed beginning deportation proceedings against him, in violation of 8 U.S.C. §1229(d).

In *Max-George*, the court held that the IIRIRA permanent rules removed federal habeas jurisdiction under 28 U.S.C. § 2241 over challenges to orders removing certain criminal

aliens under 8 U.S.C § 1252(a)(2)(C). The court held that any remaining habeas jurisdiction under the Constitution did not encompass the claims petitioner raised, including the claim that he had a right to be considered for discretionary relief from removal, which his status as an aggravated felon precluded. *Max-George*, 205 F.3d at 202.

An alien convicted of an aggravated felony and subject to a final order of removal on that basis must file a petition for review in the court of appeals. *Max-George*, 205 F.3d at 202. If a petition for review is filed, then the court of appeals must determine whether "(1) the specific conditions that bar jurisdiction in the court of appeals exist, (2) the conditions barring jurisdiction are constitutionally applied to the petitioner, and (3) the level of judicial review remaining is constitutionally adequate . . . ." *Id.* This circuit has held that unless "'a petitioner proves that his or her claims are within the writ constitutionally protected (a situation which, as the Seventh Circuit has noted, is unlikely), we must summarily dismiss for lack of jurisdiction.'" *Garnica-Vasguez*, 210 F.3d at 560 (quoting *Max-George*, 205 F.3d at 202); *see also Finlay*, 210 F.3d at 558 (same). The constitutionally protected writ of habeas corpus is not suspended unless a petition for review would be "inadequate or ineffective to test the legality of detention." *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (quoting *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998)) (internal quotation marks omitted).

Where, as here, the petitioner did not file a petition for review in the court of appeals, but instead sought habeas relief in district court, this circuit has held that the district court lacked habeas jurisdiction. *See Garnica-Vasques*, 210 F.3d at 560; *Finlay*, 210 F.3d at 558. The record in this case discloses no basis for finding that Obajuluwa raised claims within the constitutional writ, which is narrower than under section 2241. This court has held that a retroactively applied criminal categorization in the immigration context is not a due process violation, *see Max-George*, 205 F.3d 200, and that denial of consideration for discretionary relief from removal is not a constitutional violation, *see Finlay*, 210 F.3d

at 557. Obajuluwa's claim of delay based on a violation of 8 U.S.C. § 1229(d) does not fall within the ambit of the constitutionally protected writ. The district court correctly dismissed Obajuluwa's habeas petition for lack of jurisdiction.

Obajuluwa also asks this court to apply the denial of habeas prospectively, or, in the alternative, to allow him to pursue an out-of-time petition for review in this court. He argues that when the BIA issued the final removal order, the jurisdictional questions were so unclear that he should be "given the benefit of the jurisdictional doubt . . . ." (Appellant's Brief, p.42). The law is clear that "'[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.'" *United States v. Holmberg*, 19 F.3d 1062, 1065 (5th Cir. 1994) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)), *abrogated on other grounds, Henderson v. United States*, 517 U.S. 654 (1996). Given the statute, and this court's precedent, the district court's dismissal of Obajuluwa's habeas petition for lack of jurisdiction is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[May 21, 1999]

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. The petition for writ of habeas corpus is dismissed for lack of jurisdiction.

2. The Clerk shall transmit a true copy of this Order and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SIGNED this 21st day of May, 1999.

/s/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[May 21, 1999]

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Recommendation of the Magistrate Judge are correct and they are adopted as the Findings of the Court.

SIGNED this 21st day of May, 1999.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUEL OBAJULUWA Petitioner,	§ § §	
VS.	§	NO. 3-99-CV-0285-P
JANET RENO, ET AL. Respondents.	§ § §	

[April 27, 1999]

FINDINGS AND RECOMMENDATIONS OF THE
UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The findings and recommendation of the magistrate judge are as follows:

I.

This is a habeas case brought under 28 U.S.C. § 2241. Petitioner Emanuel Obajuluwa is in federal custody pursuant to an order of removal. Respondents are Attorney General Janet Reno and INS District Director Arthur E. Strapp.

Petitioner entered the United Stats as an non-immigrant visitor on December 16, 1981 for a period not to exceed six months. He became a lawful permanent resident on December 27, 1990. Thereafter, petitioner was convicted of money laundering, credit card fraud, conspiracy to commit wire fraud, and forgery. Punishment was assessed at 56 months confinement. An immigration judge ordered petitioner re-

moved to Nigeria based on these convictions.[1] Petitioner appealed this decision to the Board of Immigration Appeals. The appeal was dismissed. Petitioner then filed this action in federal court.

II.

Petitioner challenges his detention and removal on three grounds. He contends that: (1) the three-year delay in bringing removal proceedings is unreasonable and contrary to federal law; (2) he was denied due process; and (3) the retroactive application of the new immigration law violates the *ex post facto* clause of the United State Constitution.

Respondent argues that this Court lacks jurisdiction to review any immigration matter pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009. Alternatively, respondent maintains that petitioner is not entitled to habeas relief. The Court will address the jurisdictional issue first.

III.

Historically, federal judicial review of a deportation order was available either through direct appeal or habeas corpus. 8 U.S.C. §§ 1105a(a)(2) & (10) (repealed 1996). The scope of review in both types of proceedings was the same.

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[1]The Immigration and Nationality Act provides, in relevant part:

"Any alien who–

(I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."

8 U.S.C. § 1227(a)(2)(i).

Marcelio v. District Director, 634 F.2d 964, 972 (5th Cir.), *cert. denied*, 101 S. Ct. 3052 (1981). The standard was whether "reasonable, substantial, and probative evidence on the record considered as a whole supports the [deportation] order." *Id.*

The IIRIRA effectively precludes judicial review of removal orders.[2] This statute provides, in relevant part:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). Review is limited to a petition filed in the court of appeals following a final order of removal. *Id.* § 1252(a)(1) & (b)(9)[3] The statute specifies that decisions made at the discretion of the Attorney General, and removal based on the commission of specified criminal offenses, are not subject to judicial review. *Id.* § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [covered] criminal offense . . ."). These provisions govern removal proceedings commenced after April 1, 1997. *Henderson v. INS*, 157 F.3d 106, 117 n.2 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999).

Courts are split in their interpretation of the draconian restrictions created by this new legislation. *Compare Sandoval*

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[2]The IIRIRA uses the term "removal" instead of "deportation."

[3]Decisions regarding the exclusion of aliens seeking admission to the United States are still subject to habeas review under the statute. *See* 8 U.S.C. § 1252(e)(2).

v. Reno, 166 F.3d 225, 237 (3d Cir. 1999) (statute does not expressly repeal, limit, or eliminate federal habeas jurisdiction under section 2241); *Jean Baptiste v. Reno*, 144 F.3d 212, 219 (2d Cir. 1998) (same); *Goncalves v. INS*, 144 F.3d 110, 123 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999) (same); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997) (same); *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999) (same), *with LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1999) (IIRIRA precludes habeas review of constitutional claims); *Richardson v. Reno*, 162 F.3d 1338, 1378 (11th Cir. 1998), *pet. for cert. filed*, 67 USLW 3561 (February 23, 1999) (same). *See also Williams v. INS*, 114 F.3d 82, 84 (5th Cir. 1997) (noting in dicta that "limited opportunity to apply for writ of habeas corpus may remain"); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 & n.3 (10th Cir. 1997) (leaving open possibility of habeas review or other review for "substantial" constitutional errors). Indeed, the Supreme Court has acknowledged this split among the circuits. *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 942 n.7 (1999).[4]

The most exhaustive review of this issue is provided by the Eleventh Circuit in *Richardson*. After a detailed historical discussion, the court concluded that IIRIRA repealed habeas jurisdiction over immigration decisions. *Richardson*, 162 F.3d at 1378. Since most petitioners can seek adequate and effective judicial review from the court of appeals, there is no constitutional violation. *Id.* at 1379. The Court finds this opinion persuasive. *See also Abangwu v. Reno*, ___ F. Supp.___, 1999 WL 76788 *1 (N.D. Tex. February 3, 1999)

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[4]It appears that the Supreme Court has finally agreed to tackle this jurisdictional issue by granting a petition for writ of certiorari in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), *cert. granted and jmt. vacated*, 119 S. Ct. 1137 (1999). Hopefully, this will resolve the split among the circuits.

(Fitzwater, J.) (holding that district court lacks jurisdiction under 28 U.S.C § 2241 to review immigration decisions). This petition should be dismissed.[5]

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be dismissed for lack of jurisdiction.

DATED: April 27, 1999.

/s/
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

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[5]The magistrate judge acknowledges that he reached a contrary result in three prior cases. *See Tesfazghi v. Strapp*, No. 3-98-CV-1378-X (N.D. Tex. November 5, 1998); *Sayyed v. Deportation Officer Bunderson*, No. 3-98-CV-1390-D (N.D. Tex. November 5, 1998); *Aziza v. United States of America*, No. 3-98-CV-1631-H (N.D. Tex. November 5, 1998). The presiding judge in this case also ruled differently in at least one other habeas proceeding. *Philip v. District Director*, 1998 WL 241272 *2 (N.D. Tex. April 30, 1998) (Solis, J.). However, all those cases were decided before *Richardson*.

Supreme Court, U.S.
FILED
DEC - 6 2000

(2)

No. 00-523

In the Supreme Court of the United States

EMANUEL OBAJULUWA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
WILLIAM J. HOWARD
PAPU SANDHU
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

28pp

QUESTION PRESENTED

Whether the district court had jurisdiction under 28 U.S.C. 2241 over petitioner's challenge to his final removal order.

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In the Supreme Court of the United States

No. 00-523

EMANUEL OBAJULUWA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 226 F.3d 641 (Table). The judgment and order of the district court (Pet. App. 6a-7a) are unreported, as are the findings and recommendations of the magistrate judge (Pet. App. 8a-12a), the decisions of the Board of Immigration Appeals (App., *infra*, 1a-4a, 5a-7a) and the decision of the immigration judge (App., *infra*, 8a-11a).

JURISDICTION

The order of the court of appeals was entered on July 7, 2000. The petition for a writ of certiorari was filed on October 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is subject to removal if he has been convicted of any "aggravated felony," as defined in the INA at 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998). See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had a lawful unrelinquished domicile in this country for seven years, and that, if he had been convicted of an aggravated felony, he had not actually served a term of an imprisonment of five years or more. See 8 U.S.C. 1182(c).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See

8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens, including any alien convicted of an aggravated felony, categorically ineligible for discretionary relief from deportation under that Section. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998))). Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as

amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial review provisions with the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of Nigeria who entered the United States in December 1981 and became a lawful permanent resident on December 27, 1990. On August 18, 1994, he was convicted in federal district court of conspiracy to commit wire fraud, money laundering, and credit card fraud, in violation of 18 U.S.C. 1343, 1956(a)(1), and 1029(a)(2), and credit card fraud, in violation of 18 U.S.C. 1029(a)(2). See App., *infra*, 2a. The district court sentenced petitioner to two concurrent terms of 56 months' imprisonment. Pet. App. 2a.

On April 22, 1997, after the full effective date of IIRIRA, the INS placed petitioner in removal proceedings based on his 1994 convictions, which are aggravated felonies rendering an alien removable under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). Pet. App. 2a.[1] At a hearing before an immigration judge (IJ) on January 9, 1998, petitioner conceded his removability as an aggravated felon. App., *infra*, 9a. On March 6, 1998,

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[1] See 8 U.S.C. 1101(a)(43)(D) (1994 & Supp. IV 1998) (definition of aggravated felony includes money laundering involving more than $10,000); 8 U.S.C. 1101(a)(43)(M)(i) (1994 & Supp. IV 1998) (offense of fraud or deceit involving loss to victim of more than $10,000); 8 U.S.C. 1101(a)(43)(U) (Supp. IV 1998) (attempt or conspiracy to commit any listed offense). Before the enactment of IIRIRA, the INA's definition of aggravated felony required that a money laundering offense involve more than $100,000, and that a fraud or deceit offense involve a loss to the victim of more than $200,000. 8 U.S.C. 1101(a)(43)(D) and (M)(i) (1994); see IIRIRA § 321(a)(2) and (7), 110 Stat. 3009-627 to 3009-628 (amending definition of aggravated felony). Petitioner, however, would have been an aggravated felon even under the pre-IIRIRA definition. The presentence report in petitioner's criminal case, which is in the certified administrative record, indicates that his offenses involved more than $300,000, and the district court ordered petitioner to pay more than $300,000 in restitution.

the IJ ordered petitioner removed to Nigeria. *Id.* at 11a.

The Board of Immigration Appeals (BIA) affirmed. The BIA held that petitioner was ineligible for relief under 8 U.S.C. 1182(c) (1994) because that form of relief had been repealed by IIRIRA and was not available in post-IIRIRA removal proceedings. App., *infra*, 4a. The BIA also ruled (*ibid.*) that, as petitioner had been convicted of aggravated felonies, he was also ineligible for the discretionary relief that replaced Section 1182(c) for aliens in removal proceedings—namely, cancellation of removal under Section 1229b(a)(3).

On November 25, 1998, the BIA denied petitioner's motion to reconsider. App., *infra*, 5a-7a. As in its initial decision, the BIA stated that petitioner was in removal proceedings and thus was not eligible for relief under Section 1182(c), and that he was ineligible for cancellation of removal because of his criminal convictions. *Id.* at 6a-7a. The BIA also rejected petitioner's argument that IIRIRA's repeal of Section 1182(c) should not be applied "retroactively" to his case because he was convicted of his crimes prior to the changes in the law. The BIA further stated that it lacked jurisdiction to consider petitioner's objections to the constitutionality of that repeal as applied to his case. *Id.* at 7a.

3. Petitioner did not file a petition for review of his removal order in the court of appeals. Rather, on February 9, 1999, petitioner filed a petition for a writ of habeas corpus in district court, seeking to invoke that court's jurisdiction under 28 U.S.C. 2241. Petitioner contended that the BIA's decision holding him ineligible for relief under former Section 1182(c) was a "retroactive" application of IIRIRA's repeal of that provision that violated the Due Process and Ex Post Facto

Clauses of the Constitution. Petitioner also contended that the INS unlawfully delayed the commencement of his removal proceedings until after the effective date of IIRIRA. The government moved to dismiss on the ground that AEDPA and IIRIRA had divested the district courts of authority under 28 U.S.C. 2241 to review the merits of aliens' removal orders, and that any judicial review that remained available to criminal aliens such as petitioner must be had, if at all, in the court of appeals on petition for review. Pet. App. 8a-9a. Based on the recommendation of the magistrate judge, the district court agreed and dismissed the petition. *Id.* at 6a-7a, 8a-12a.

4. The court of appeals affirmed the district court's dismissal of the habeas corpus petition. The court relied (Pet. App. 3a-4a) on its recent decision in *Max-George* v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280, which held (*id.* at 198-203) that IIRIRA divested the district courts of authority to review the merits of final deportation orders under 28 U.S.C. 2241. The court also indicated (Pet. App. 4a-5a) that the preclusion of review under Section 2241 in petitioner's case raised no concerns about an unconstitutional suspension of habeas corpus because "[t]he record in this case discloses no basis for finding that [petitioner] raised claims within the constitutional writ [of habeas corpus], which is narrower than under section 2241." In particular, the court stated that it had previously held that "a retroactively applied criminal categorization in the immigration context is not a due process violation," and that "denial of consideration for discretionary relief is not a constitutional violation." *Id.* at 4a-5a. The court also stated that petitioner's "claim

of delay * * * does not fall within the ambit of the constitutionally protected writ." *Id.* at 5a.[2]

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the Nation's immigration laws made by AEDPA and IIRIRA, the district courts retain authority under 28 U.S.C. 2241 to review an alien's challenge to the merits of his final removal order. Petitioner correctly points out (Pet. 8-9) that the courts of appeals have reached differing conclusions on that question. The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have concluded that Congress divested the district courts of such authority. By contrast, the First, Second, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over retroactivity challenge); *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000) (same), petition for cert. pending, No. 00-767; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) (same); see

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[2] On October 10, 2000, five days after petitioner filed his petition for a writ of certiorari in this case, petitioner filed in district court an emergency motion to stay his removal pending disposition of the certiorari petition. On October 12, 2000, the district court ruled that it had no jurisdiction to stay the mandate of the Fifth Circuit and denied petitioner's motion. On October 12, 2000, the court of appeals also entered an order denying petitioner's motion for a stay of removal. Petitioner did not seek a stay in this Court. We are informed by the INS that, on October 13, 2000, petitioner was removed to Nigeria.

also *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (same), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[3] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue. In particular, our petition in *St. Cyr* also seeks review of the court of appeals' decision ruling for the alien on his challenge to the merits of the removal order in that case, which independently warrants plenary review in the event that the Court concludes in that case that jurisdiction was proper

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[3] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented by the petitions in *Zalawadia* v. *Reno*, No. 00-268; *Rodriguez* v. *INS*, No. 00-753; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

under 28 U.S.C. 2241. See 00-767 Pet. at 26-30; *St. Cyr*, 229 F.3d at 410-420.[4] The petition in this case, however, presents only the jurisdictional issue.[5] We therefore suggest that the Court hold the petition in this case pending its disposition of the petition in *St. Cyr*, and then dispose of this petition in light of the disposition of *St. Cyr*.

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[4] We noted in our petition (at 26-30) in *St. Cyr* that the Second Circuit's decision on the merits could not be reconciled with decisions of the Seventh and Eleventh Circuits. Since that petition was filed, the Ninth Circuit has issued a decision that also diverges from the Second Circuit's decision on the merits in *St. Cyr*. In *St. Cyr*, the Second Circuit held that IIRIRA's repeal of Section 1182(c) was not applicable in the case of any alien who pleaded guilty to an aggravated felony before the enactment of AEDPA and IIRIRA. See 229 F.3d at 417-421. In *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956, at *4 (Nov. 17, 2000), the Ninth Circuit concluded that IIRIRA's repeal of Section 1182(c) may be applied to an alien who pleaded guilty before AEDPA and IIRIRA were enacted, except in the "rare circumstance" where the alien shows that he pleaded guilty in specific reliance on the state of the law at the time, permitting him to apply for relief under Section 1182(c).

[5] In adddition, as we have explained at p. 9 n.2, *supra*, petitioner has been removed to Nigeria. Although IIRIRA's new judicial review provisions repeal the provision in prior law that a court may not review a deportation order entered against an alien who has departed from the United States, see 8 U.S.C. 1105a(c) (1994), petitioner's removal in our view is a factor that further suggests this would not be the best vehicle for resolution of the jurisdictional issue.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
WILLIAM J. HOWARD
PAPU SANDHU
Attorneys

DECEMBER 2000

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 879 391 – Dallas Date: Sep 28 1998

In re: EMMANUEL OBAJULUWA
a.k.a. Tobi Obajuluwa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

CHARGE: Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Asylum; withholding of removal; cancellation of removal

The respondent appeals from a decision of an Immigration Judge ordering him removed from the

United States to Nigeria as charged. The appeal is dismissed.[6]

The respondent is a native and citizen of Nigeria and a lawful permanent resident of the United States. The record reflects that on August 18, 1994, the respondent was convicted in the United States District Court for the Southern District of Texas of Conspiracy to Violate 18 U.S.C. §§ 1343, 1956(a)(1), and 1029(a)(2) in violation of 18 U.S.C. § 371, and of Credit Card Fraud, in violation of 18 U.S.C. § 1029(a)(2). The respondent was sentenced to imprisonment for a term of 56 months for each count, sentences to run concurrently. Both of these crimes clearly fall within the definition of an "aggravated felony." *See* sections 101(a)(43)(D), (M)(i), and (U) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(D), (M)(i), and (U).

At a hearing held on January 9, 1998, the respondent conceded removability as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Tr. At 3). The Immigration Judge found that the respondent was statutorily precluded from applying for or being granted asylum because of his aggravated felony convictions (Tr. At 5; I.J. at 4). *See* section 208(b)(2) of the Act.

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[6] The Notice to Appear (Form I-862) in this case was issued after April 1, 1997. Therefore, the law as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), applies to these proceedings.

The respondent, through counsel, indicated on January 9, 1998, that he may wish to apply for withholding of removal, and proceedings were continued until January 30, 1998, for filing of the application (Tr. at 14). On January 30, 1998, the respondent, again through counsel, stated that his application for withholding of removal was not yet ready (Tr. at 26). The Immigration Judge notified the respondent that his application must be filed by February 5, 1998 (Tr. at 26). On February 6, 1998, the respondent's counsel submitted a motion to withdraw as attorney of record. The Immigration Judge subsequently extended the filing deadline to February 27, 1998, and again to March 6, 1998, but the respondent failed to submit an application for relief on those dates (Tr. at 28). On March 6, 1998, the Immigration Judge found that the respondent had abandoned his application for withholding of removal, that he was ineligible for any other form of relief, and ordered him removed to Nigeria as charged (Tr. at 29, 31; I.J. at 2-4).

On appeal, the respondent argues that the Immigration Judge erred in not allowing him additional time to file his application for withholding and in not considering the harm the respondent may face upon return to Nigeria. In support of his appeal, the respondent has submitted an application for asylum and withholding (Form I-589), in addition to a newspaper article about Nigeria. However, we find that the respondent was provided ample opportunity to complete his application for withholding of removal and we agree with the Immigration Judge that he abandoned this application. The regulations provide that if an application is not filed within the time set by the Immigration Judge, the opportunity shall be deemed waived. 8 C.F.R. § 3.31(c).

Furthermore, this Board had long held that applications for relief under the Act are properly denied as abandoned or for lack of prosecution when the alien fails to file for or pursue them. *Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987), and the cases cited therein; *Matter of Jean*, 17 I&N Dec. 100 (BIA 1979), *modified on other grounds, Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992).

On appeal, the respondent also argues that he is eligible for relief under section 212(c) of the Act. However, this relief is not available to the respondent in removal proceedings, having been repealed and replaced by section 240A of the Act. The respondent is not eligible for cancellation of removal under section 240A of the Act because he has been convicted of aggravated felonies. *See* section 240A(a)(3) of the Act. Although the respondent raises objections to the constitutionality of the law as it applies in this case, it is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). We must apply the law as written. *See Matter of Gonzalez-Camarillo*, Interim Decision 3320 (BIA 1997), and cases cited therein; *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

As the respondent has not demonstrated eligibility for any relief, the appeal is dismissed and the decision of the Immigration Judge is affirmed.

ORDER: The appeal is dismissed.

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FOR THE BOARD

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 879 391 – Dallas Date: Nov 25 1998

In re: EMMANUEL OBAJULUWA
a.k.a. Tobi Obajuluwa

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

CHARGE: Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The case was last before us on September 28, 1998, when we dismissed the respondent's appeal from an Immigration Judge's decision finding him removable as charged, determining that he

had abandoned his application for withholding of removal, and finding him statutorily ineligible for any other form of relief from removal due to his aggravated felony convictions. The respondent has filed a timely motion to reconsider our September 28, 1998, decision. The respondent's motion is denied.

A motion to reconsider requests that the original decision be reexamined because improper legal standards were applied, there have been recent changes of law, or there was an argument or aspect of the case that was overlooked or misconstrued. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd* 979 F.2d 212 (11th Cir. 1992); 8 C.F.R. § 3.2 (b) (1998).

In support of his motion, the respondent argues that we erred in finding him ineligible for relief under section 212(c) of the Immigration and Nationality Act. However, as we noted in our prior decision, this relief is not available to the respondent in removal proceedings, having been repealed and replaced by section 240A of the Act. Moreover, the respondent is statutorily ineligible for cancellation of removal under section 240A because he has been convicted of aggravated felonies. *See* section 240A(a)(3) of the Act. With respect to the respondent's argument that he was convicted of his crimes before the recent changes in immigration law and therefore the laws should not be applied retroactively, we note that the changes in the definition of an aggravated felony apply to all convictions "regardless of whether they were entered before, on, or after the date of enactment." Section 321(b) of IIRIRA. This definition applies to "all actions taken on or after the enactment of (IIRIRA), regardless of when the conviction occurred." Section 321(c) of IIRIRA.

Although the respondent once again raises numerous objections to the constitutionality of the law as it applies in his case, we reiterate that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *Matter of C-*, 20 I&N Dec. t529 (BIA 1992). We must apply the law as written. *See Matter of Gonzalez-Camarillo*, Interim Decision 3320 (BIA 1997), and cases cited therein; *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

The authorities cited by the respondent in support of his motion are either inapposite or are not binding on this Board outside the jurisdiction in which they arose. We therefore find no reason to disturb our prior decision in this case. Accordingly, the motion to reconsider is denied.

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FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Dallas, Texas

File No.: A 91 879 391 March 6, 1998

In the Matter of	)	
	)	
EMMANUEL OBAJULUWA	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 327(a)(2)(A)(iii); conviction of an aggravated felony

APPLICATION: Asylum and withholding of deportation.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Pro Se	John Allums, Esquire General Attorney Dallas, TX

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36 year-old married (but separated) male alien, a native and citizen of Nigeria, who entered the United States as a visitor in 1981 at

Detroit, Michigan. He stayed many years beyond his authorized period of stay and was later adjusted to the status of a permanent resident in December of 1990. He was placed in removal proceedings pursuant to a Notice to Appear dated April 22, 1997 charging him with removal under the above-referenced section of the Act and specifically on the basis of an allegation of an August 1994 conviction in federal court for conspiracy and credit card fraud.

The respondent, initially represented by counsel in bond proceedings and at the initial master calendar, admitted the enumerated allegations contained in the charging document and conceded his removability. Nigeria has been designated by the Court as the country for removal.

The original counsel for respondent, after consultation with the respondent, indicated that he could not, in good faith, proceed with a request for any relief relating to asylum or withholding. Accordingly, the respondent's counsel asked for and with the concurrence of the respondent received a permission to withdraw from this case and an order was executed. The respondent then proceeded and was provided additional time to both look for an attorney and to file the application for relief. It should be noted that this case originally began out at the Big Spring Correctional Facility and the respondent has been in these proceedings since at least May of 1997. He has had numerous opportunities to file the I-589 relative to his purported request for withholding of deportation. He has had at least three separate dates by which those applications in bare and minimal form were due before the Court. He last appeared one week ago today at which time he again

failed to have the application and, despite these many opportunities and continuances, the respondent appeared again today despite this Court's warnings without an application.

The respondent presented himself today again without the application and asked for additional time to both obtain an attorney and to submit the application. He purported to have retained an attorney by the name of David Butbul, who is an attorney known to this Court in Chicago, Illinois. This Court endeavored to contact Mr. Butbul, however, he was not available. Speaking with his administrative assistant, she reported that no outstanding file existed which would reflect the representation by Mr. Butbul of this respondent.

This Court views the respondent's 10 months in proceedings and various times with the assistance of counsel and with full knowledge of the issues facing him and the very limited opportunity for relief, as having utterly no excuse for a failure in a 10-month period of time to submit an I-589. Accordingly, the Court believes, as I ruled in an earlier bond motion, that this respondent is an individual engaged in nothing but dilatory tactics who will continue to seek every possible unmerited delay in order to prevent his return to Nigeria. This Court again encourages anyone reviewing this matter at any stage and any time to ensure that nothing is done to remove the fact that this respondent remains solely in the custody without bond of the Immigration Service during the pendency of this and any other proceedings.

That said, the Court finds that the respondent has knowingly and willfully abandoned any purported application for relief. He is statutorily ineligible as an aggravated felon for asylum and he has stated absolutely no basis under which he can seek withholding of deportation. At some point in time there is such a thing a personal accountability and this respondent has been babied through this process and offered every opportunity to articulate a meaningful form of relief. His failure to do so is inexcusable and he has fully merited his order of removal to the nation of Nigeria.

There is no other relief available for this convicted aggravated felon.

Accordingly, on the basis of the totality of the evidence and the circumstances of this case, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States as an aggravated felon to the nation of Nigeria.

D. ANTHONY ROGERS
D. ANTHONY ROGERS,
Immigration Judge